No. 1241

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OCTOBER TERM, A. D. 1905.

JEROME P. PORTER, JOHN G. JURY, THOMAS W. CHANDLER, CHARLES J. CARR AND MRS. MARY THOMPSON,

Appellants.

vs.

TONOPAH NORTH STAR TUNNEL AND DEVELOPMENT COMPANY, (a Corporation),

Appellee.

FILED
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BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

The appellee made application in the United States Land Office for a patent to the "Ivanpah" Quartz Claim, situate in Tonopah, Nevada. The appellants filed an adverse claim in said Land Office, and in support thereof brought suit in the United States Circuit Court, District of Nevada, asserting that the "Dave

Lewis Hope" Claim (later re-named the "Mizpah Intersection"), owned by them, had the better right. The case was tried before the Hon. Thos. P. Hawley, and a decree was made and entered in favor of the appellee, February 20th, 1905.

ARGUMENT.

We cannot agree to many of what are called in Appellants' Brief, at page 3, "Undisputed Facts," nor in many of the statements alleged to be facts in the argument of appellants.

We specially assert that the plat attached to the Appellants' brief is incorrect in essential features, and that the same was not copied correctly from the plat in the Record at page 514 thereof.

At the trial more than twenty witnesses testified orally, and a great many documents were introduced in evidence. The testimony of the witnesses from time to time was illustrated by blackboard diagrams drawn in open Court. From our point of view the appellants utterly and signally failed to establish a location upon any specific part of Oddie Mountain. The appellee showed clearly and conclusively a location, to-wit, the "Ivanpah," notice of which was posted about October 10th, 1901 (Record, 212), and fixed the locus thereof upon the ground so that its boundaries could be readily traced, and, while there was some delay in carrying out some of the provisions of the Nevada statute, the enact-

ments thereof were all finally and before any intervening rights, fully complied with.

It was claimed by appellants that the "Dave Lewis Hope" claim was located August 26th, 1901 (Record, 61); that thereafter some work was done thereon in the effort to comply with the Nevada statute. The location was claimed to have been made by C. J. Carr and David R. Lewis. Prior to the time of the trial D. R. Lewis had passed away, and Charles J. Carr was the only witness as to what work was done, where it was done by him, and as to where he placed certain notices and monuments. Nearly all of the material statements made by Carr were contradicted by from eight to ten witnesses and, further, he was impeached as to his general character for truth, honesty and integrity by a large number of sterling men of affairs.

Judge Hawley in his opinion stated that the testimony upon many points was more or less conflicting and in many respects unsatisfactory, and that there was more or less uncertainty in the testimony upon all the controlling questions of fact involved in the case.

It was the effort of the complainants at the trial to locate their claims so that there would be an overlap of the "Dave Lewis Hope" and the "Ivanpah," but where said "Dave Lewis Hope" claim was originally or at any time located, we assert can not be determined from the evidence. In their brief counsel say that the "Dave Lewis Hope" claim was located on the westerly slope of Mt. Oddie, August 26, 1901, and refer to the "Dave

Lewis Hope" location notices at pages 73-75 of the record. The location notice at page 73 of the record recites: "This mine is situated in the hill or moun- "tain east of the group of mines known as the "Tonopah mines owned by J. Butler and Co.," and that it was in the Tonopah Mining District. All that this shows, we submit, is that the mine was in a hill or mountain, which hill or mountain was east of the Tonopah group of mines. Further the location notice, which was recorded in the County Recorder's office, says the lode is supposed to run northwest and south*east,* and at page 75 of the record the notice recorded in the mining records says that the lode is supposed to run northwest and south*west.* That was the contest during the entire trial,—that the "Dave Lewis Hope" (or Mizpah Intersection) claim was somewhere, but where the Court was unable to determine, and so stated in its opinion. We understand that the rules of law make it incumbent upon the appellants to establish by competent evidence the exact location of their claim upon the ground. This they were absolutely unable to do, as there was conflict between their own witnesses, as well as a sharp conflict with the witnesses on their side as against those for the defendant.

For instance, the witness Ray testified that the "Dave Lewis Hope" claim was to the east (Record, p. 277) of the "Ivanpah"; that it did not cover the same ground, but that there was no chance for a claim between (Record, p. 278).

The witness Ish (Record, p. 223) says that, from the "Ivanpah" new North Star shaft it must have been five or six hundred feet up on top of the hill to the "Dave Lewis Hope" location place. Also, he says (Record, p. 226) that the cut made by Ray would be fifty or one hundred feet outside of the place where the west lines of the "Dave Lewis Hope" could have been.

The witness Salsberry (Record, p. 333) says that the two locations cover different ground altogether, and the witnesses F. Golden, W. J. Harris, Booker, R. B. Davis and others, make statements to the same effect.

As stated before, the witnesses illustrated their testimony by photographs, some of which have not been reproduced in the record, and by diagrams on the blackboard; and thus the trial Court was able to get a grasp and understanding of the case which is not obtainable from the record filed in this Court.

Taking the witnesses' explanations on the stand, with references to the blackboard and diagrams, and their declarations that the locations actually cover different ground, and the burden being on the complainants to make out a case against conflicting evidence, the fact that the main witness for complainants was impeached, that his testimony was contradictory of itself, that the other main witnesses for complainants (Porter and Caper) in their respective testimony made many different contradictory statements, we contend that the trial Court could not arrive at any other conclusion than it did. We regret that so much labor must be imposed

upon the Court in this case, as it will be necessary to read a large part of the testimony, in order to compass the same, as isolated extracts taken from the record, where sometimes the witnesses and counsel were at variance as to the ground respecting which the question was asked or answered, cannot give a true insight into the point of view of the trial Court.

The appellee claims under a location made October 10th, 1901, by F. M. Ish, and certain work shown to have been done thereafter in compliance with the laws of the United States and of the State of Nevada. It appeared from the testimony of the witness W. J. Harris that the appellee had expended, prior to the time of the trial, about seventy thousand dollars (Record, 389), and it was the contention of the appellee at the trial and it is its contention here, that an attempt was being made to float the "Dave Lewis Hope" claim westerly over on to the "Ivanpah" ground; that Carr had attempted some kind of a location somewhere, but where it was incumbent for appellants to show. If the apex of a mountain is not where it comes to a point at the top or summit, we think it is for the complainants to show upon which of the tops or apices of Mount Oddie the "Dave Lewis Hope" was located, because the photograph shows several apices or tops of the mountain, and only shows one view thereof. It can be readily supposed that there are other hogsbacks outside of the camera lens. Without the aid of a dictionary we have

always understood that the apex of a mountain was its top, and that is the ordinary and usual definition of the term as given by the Century dictionary, to-wit: "the top, point or summit of anything;" and was, we submit, the sense in which the same was used throughout the trial.

Respecting the cut or preliminary work done on the "Dave Lewis Hope" location, attempted to be located August 26th, 1901, Carr testifies (at page 106) that the cut that he made there with his co-locator, Dave Lewis, was right alongside of his location monument (Record, p. 106 top), and that the location monument was on the ledge that he claimed (Record, p. 106 top); that his work was a cross-cut about fifteen feet long, eight feet high and five feet wide (p. 80); that the monument was on the top side of the cut up hill from it (Record, p. 107). Porter testifies that he saw this same cut in November, and that in May he went back and did work on the same (Record, pp. 157-8).

Ish says that the alleged "Dave Lewis Hope" and the "Ivanpah" are on different leads and never come within 100 feet of one another and continue to diverge as they go north (Record, p. 271). The croppings have a different strike (p. 270). Ish did not, however, think the "Dave Lewis Hope" was on a ledge, it was simply a discolored streak in the rhyolite (p. 269 bottom), while Ramsay says there was nothing but manganese where Carr claims his cut was (Record, p. 473 bottom).

Counsel, at page 16 of Appellants' brief, criticize the

production by the defendant of witnesses who were stockholders and officers of the company. It strikes us that, from the plenitude of people at Tonopah, the only disinterested witnesses produced by appellants being Martin Caper and Young, that they should not complain because appellee produced only seven times as many.

Counsel also says, at page 17, that the "Ivanpah" was so located that it embraced the "Dave Lewis Hope" ledge, and cites Defendant's Exhibit "B" (p. 227), which is our certificate of location, filed January 8th, 1902. It does not mention or refer by a single word to the "Dave Lewis Hope" claim or anything connected with it.

They also say that no development work was done on the "Ivanpah," and that thousands of dollars were expended on the "Dave Lewis Hope" claim, and cite the record at pages 389-390, at neither of which pages, nor anywhere else, is there a word to the effect that the appellee ever worked on the "Dave Lewis Hope" at all. The testimony does show, however, that in June, 1902, the defendant began work on the "Ivanpah" vein, in sinking the new North Star shaft (Golden, p. 457; Harris, p. 389). This work was done several hundred feet southerly of the preliminary location work or cut of Ish. Counsel say that defendant took forcible possession of the "Dave Lewis Hope" claim on or about June 10th, 1902, against the protest of plaintiffs, and prevented plaintiffs from surveying said claim in June, 1903. There is no evidence at any place in the record that the

plaintiff ever took forcible possession of the "Dave Lewis Hope" claim or that they ever took forcible possession of any other claim, nor was their possession of the "Ivanpah" held by force. Complainant sent a notice that appellee was trespassing upon their so-called "Dave Lewis Hope," or "Mizpah Intersection," claim, on or about June 10th, 1902, to which no attention was paid by the appellee, and that is all there is in the vigorous and unfair language used in appellants' brief.

As to the surveying of the claim, Mr. Booker, United States Deputy Mineral Surveyor (Record, p. 478), testified that he made an application to Mr. Pittman for permission to go upon the "Ivanpah" or "North Star" ground and make a survey or surveys of the so-called "Dave Lewis Hope," or "Mizpah Intersection" claim; that permission was granted to make the survey, and that he communicated the permission to Schuyler Duryea, agent and attorney for appellants, and that he—Booker—wished to proceed, but that employment was not forthcoming. This was in October, 1903. The witness further said that prior to this application, that he had heard while he was away that an employee of his had been sent to make a survey of the "Dave Lewis Hope" claim in January, and was prevented from doing so by some of the "North Star" people (see Record, pp. 480-481). Thus it will be seen that appellee was willing to permit the survey, but appellant did not wish one.

Counsel say in the last paragraph of page 20 of their brief:

"In short, while there is a subsisting location on min-
" ing ground no person can place a second location on
" the same ground in anticipation of an abandonment or
" forfeiture of the first location, and after such aban-
" donment or forfeiture has taken place claim rights
" under the second location. The second location was
" void *ab initio* and cannot be revived."

The most that is claimed by the appellant here is that the "Dave Lewis Hope" and "Ivanpah" overlap in part, and with that feature in view, and for the edification of counsel, with some hesitation we beg leave to call attention to a very late decision of the Supreme Court of the United States in *Lavignino* vs. *Uhlig,* decided May 29, 1905, 25th Supreme Court Reporter, 716. At page 720, it is said:

"Of course, the effect of the construction which we
" have thus given to Section 2326 of the Revised Stat-
" utes, is to cause the provisions of that Section to
" qualify Sections 2319-2324, * * * thereby pre-
" venting mineral lands of the United States which have
" been the subject of conflicting locations from becom-
" ing *quoad* the claims of third parties, unoccupied
" mineral lands by the mere forfeiture of one of such
" locations. In text books (Barringer & A., Mines
" and Mining, p. 306; Lindley, Mines, 2d Ed., p. 650),
" statements are found which seemingly indicate that in

" the opinions of the writers, on the forfeiture of a sen-
" ior mining location *quoad* a junior and conflicting
" location the area of conflict becomes in an unqualified
" sense unoccupied mineral lands of the United States
" without inuring in any way to the benefit of the junior
" location. But in the treatises referred to no account is
" taken of the effect of the express provisions of the Re-
" vised Statutes Sec. 2326."

This opinion was quite a surprise to us. We doubt if it is applicable in any other than patent cases, but the case at bar is a patent case and this decision being the latest expression of the Supreme Court of the United States upon the subject, it, if not decisive in patent cases alone, will be the means of educating us to the errors that we have fallen into in applying many of the principles of mining law. Its application to this case would be decisive if it were admitted that there was an overlap of the two locations and it being admitted that Carr's notice of location was posted August 26, 1901, that he did not within 90 days or ever file a certificate of location as prescribed by the Statutes of Nevada; that he did not do in 1901, the work required by the Statute of Nevada—as was conclusively shown by the evidence; inasmuch as all the work claimed by him was a cross-cut exposing the ledge to a depth of not over eight feet, and the Statute says ten feet—and that the alleged work done in February was after the intervening "Ivanpah"-Ish rights. Therefore, the work in February was futile and Porter by his notice of May 17, 1902, could

not initiate a new location or a re-location,—because the "Ivanpah" intervened the first alleged acts of Carr and Lewis.

The "Ivanpah" people's discovery cut was 800 feet Southerly of the North end line. In June of 1902 they started their new working shaft, about 400 feet southerly and called it the New North Star shaft, which was in line with their North Star Tunnel and thereafter filed a true and proper certificate of location based upon the Ish location of the "Ivanpah."

In this connection we wish to refer to the cases cited from Montana by counsel for appellant and the case of *Butte City Water Co.* vs. *Baker,* 196 U. S., 119.

This latter case went up from Montana and the State Court below said:

"The next error alleged is that the Court erred in ex-
" cluding the location of the defendant's Keyno claim.
" We have examined this notice of location, and are
" satisfied it does not conform to the Statute of the State
" of Montana, or with the construction of this Court in
" the case of *Purdum* vs. *Ladden,* 23 Mont., 387. * * *
" We are satisfied, therefore, that the Court did not err
" in excluding the location notice of the 'Kenyo' claim"
(p. 226). See *Baker* vs. *Butte City Water Co.,* 28 Mont., pp. 222, 226.

Therefore all that was decided below was that the location certificate was not admissible in evidence and that was all that was before the Supreme Court of the United States on appeal on that point.

We have been of the impression that under the Nevada Act, which provides for the making and recording of a location certificate, and further provides that any record of a location not containing the requirements shall be void, but that any record containing the requirements, or a copy thereof, duly verified or certified, shall be *prima facie* evidence of the facts therein stated, was penal in character ,and should be construed strictly if any forfeiture of rights was urged. That the Act gave those who filed the certificate prescribed therein the right to use the same as *prima facie* evidence, but a failure to file the certificate containing all the requirements required by Statute, would deprive them only of the right to that *prima facie* evidence and force the parties claiming title to the mine to prove their location by other direct evidence. The law never favors a forfeiture, and we believed that the settled law was in conformity to the doctrine laid down in *Jupiter* vs. *Bodie,* 11 Fed. Rep., p. 680, by Judge Sawyer, that, "assuming the proposition that the miners have "authority to make a regulation or law by which "a mining claim may be forfeited by failure to record "the location thereof, that such regulation or right, in "order to effect a forfeiture must provide that such "failure to record shall work a forfeiture of the claim"; and quoting *Bell* vs. *Bed Rock To. M. Co.,* 36 Cal., 211, as follows:

"The failure of a party to comply with a mining rule

" or regulation cannot work a forfeiture unless the rule " itself so provides."

See *Emerson* vs. *McWhirter,* 133 Cal., 510.

Construing the Nevada Statute strictly, it does not provide for a forfeiture of the location, but merely deprives one of the benefit or favor of using *ex parte* a self-serving declaration as *prima facie* evidence, if a certificate is not made in compliance with the section. Failing compliance with the section, direct and primary evidence may be introduced of the acts required to carve out from the public domain a mining location. The Nevada Statute does not say a man shall lose his location—shall forfeit his claim.

But, if we have been wrong in taking that view of the Nevada mining law, we contend that our opponents should be measured by the same tapes with which they are endeavoring to fit our clothes. Applying the same arguments that they use to attack us, their location certificates (which we objected to) are void and therefore their location void, and for the two-fold reason:

First: An examination of the original and amended certificates of location disclose the following facts, viz.: The original location notice of the "Dave Lewis Hope" dated August 26, 1901, and filed for record on September 2, 1901, in the office of the County Recorder, recites that the undersigned has located 1500 linear feet on this vein or lode, supposed to run in a north*west* and south*east* direction (Record, 73), and wherein the locator claims 1000 feet southeasterly from "this monument,"

while the notice recorded in the office of the District Recorder of Tonopah Mining District recites that the vein or lode is supposed to run in a north*west* and south-*west* direction from this monument, and running one thousand feet in a southeasterly direction. * * *

In the amended certificate contained in the abstract of title attached to the adverse of appellants (Record, p. 507), there appears the following:

"From the discovery point at the *discovery shaft* " there is claimed by me *1000* feet in a southeasterly " direction and *five hundred* feet in a northwesterly di- " rection * * *" while in certificate offered as Defendant's Exhibit A (Record, pp. 533-4), the direction is given as *southerly* and *northerly,* and the initial point is the *"discovery shaft* or *monument."*

In Complainants' Exhibit 6 (Record, pp. 168-9), the initial point is the discovery *monument.*

While still further in Complainants' Exhibit C (Record, pp. 503-4) attached to his adverse, the initial point is the *discovery shaft.*

Again, in the certificate offered as (Defendants' Exhibit G, Record, p. 550) the initial point is the discovery point at the *discovery shaft,* and the courses are given as *southeasterly* and *northwesterly.*

Further, there is no compliance with the statute of Nevada (Section 210), which requires (Subdivision 6th): "The location *and description,* of each corner with the markings thereon."

Section 209 of the Nevada Statute, as amended in 1901, prescribes how the boundaries of a claim shall be marked, either by a tree or rock in place, or by setting a post or stone, *one at each corner* and one at the center of each side line. And further provides that when a post is used, "it must be at least 4 inches square, by four " feet six inches in length, set one foot in the ground, " with a mound of stones or earth four feet in diam- " eter, by two feet in height around the post"; or where it is impossible to sink the posts, "they may be placed in a pile of stones" . . . "when a stone is used, not a " rock in place, it must be at least six inches square and " eighteen inches in length, set two-thirds of its length " in the ground, which trees, stakes or monuments must " be so marked as to designate the courses of the claims."

Compliance with the statute (Section 210, Subdivision 6) in this respect would require three things, with reference to the corners—i. e., their location, *description* and markings, and such description, we take it, must be made with reference to the provisions of Section 209.

The Century Dictionary defines description as:

"A marking out, delineation, copy, transcript, repre- " sentation . . . representation by visible lines, " marks, colors, etc."

A mere reference to a post marked "northwest corner 'Mizpah Intersection,' etc.," is simply a partial

compliance with the statute in relation to the marking and location, but an entire omission of the description of each corner required. Neither the size, height of post, nor whether set in mound or not, is given.

To illustrate, we beg to refer the Court to the description of the corners contained in our amended certificate of location (Record, pp. 538-9), and submit that the failure of the appellants to comply with the Nevada statute in their certificate, rendered it invalid.

See

Hahn vs. *James,* 73 Pac. Rep., 965 (Montana).

Again, under the provisions of Section 209 of the Nevada Statute as amended in 1901, within ninety days from the posting of the notices on the claim, the locator must sink a discovery shaft to a designated depth, or in default thereof, the statute provides that he may, as an equivalent therefor, run a "cut or cross cut or tunnel " which cuts the lode at a depth of ten feet, or an open " cut along the ledge or lode equivalent in size to a " shaft, four feet by six feet by ten feet deep . . ."

The statute contemplates the doing of one of five things. Sinking a discovery shaft upon the claim located to the depth of "at least ten feet from the lowest " part of the rim of such shaft at the surface, or deeper " if necessary, to show the lode deposit of mineral in " place; or, a cut or cross cut or tunnel which cuts the " lode at a depth of ten feet; or an open cut along the

" ledge or lode equivalent in size to a shaft four feet by " six feet by ten feet deep . . ."

Appellants allege in their certificate that the "discovery shaft or its equivalent" is situated, etc. This is in the alternative, and it is not possible to gather from it whether there is a discovery shaft of the statutory dimensions, or cut, cross cut or a tunnel, any one of which cuts the lode at a depth of ten feet, or an open cut along the ledge or lode of the required depth.

The very essence of the statute is that there shall be certainty in these notices, and we submit that it is impossible to ascertain from the foregoing language what preliminary work was done.

Furthermore, the locator claims one thousand feet in a *southeasterly* direction from the *discovery shaft.* Taking this shaft as his initial point, he claims one thousand feet southeasterly therefrom and five hundred feet in a northwesterly direction. The certificate then recites that the "discovery shaft or its equivalent" is situated upon the claim eight hundred feet *south* from the north-end center of the claim.

This description creates an anomalous condition. Taking the initial point as the discovery shaft, and running the line southeasterly one thousand feet, establishes the south-end center. Then, again, starting from the discovery shaft, and running a line five hundred feet northwesterly, establishes the north-end center. He has now his boundaries established and his discovery shaft

at a fixed point. What then appears? Under the statute he is required to state the location of his discovery shaft, which he proceeds to do as follows:

"Such discovery shaft or its equivalent is situated "upon the claim *eight hundred* feet *south* from the "north-end center." He has already shown that it is *five hundred* feet south of the north-end center, but by this statement he carries it three hundred feet south on the lode; and if we are to be controlled by the first statement, that he claims one thousand feet southeasterly from the discovery shaft, then he carries his southeast lines three hundred feet outside of the south-end line; while pursuing the same process of reasoning, if we take this latter location of the discovery shaft and run the course northwesterly three hundred feet therefrom, we are shy three hundred feet from the north-end center line. It will thus appear that the *same discovery shaft* appears at *two* different points on the claim at a distance of *three* hundred feet apart.

Practically the same conditions would exist were we to take the initial point as the "monument" referred to in one of these certificates. It will be remembered that Carr, one of the original locators, testified that he made the cut right alongside of his discovery monument (Record, p. 106). And Porter testified that he enlarged it in May, 1902 (Record, pp. 157-8), but not to the extent of making a new or re-location (Record, p. 160),

nor did he ever comply with the statute as to a new or amendatory location.

If we are to be controlled by the strict construction of the statute as maintained by counsel for appellants in regard to our certificate of location, they can have no reason to complain if we cite the cases quoted by them as sustaining their construction, notably the decision of the Supreme Court of the United States in the case of *Butte City Water Co.* vs. *Baker,* 196 U. S., 119, 128.

Under the rule laid down therein, we submit appellants have failed signally to comply with the Nevada Statutes, and their amended certificates are for that reason void.

Finally, and as conclusive upon the validity of these certificates, there has been an entire failure to comply with the provisions of the Nevada State Statute, Section 210, Subdivision 3. There is absolutely no reference therein to a "permanent monument" or a "natural object." We ask an examination of the certificates. We do not need to cite authorities to the point that such omission absolutely vitiates the location.

Second: Another point, and one we think which settles the vital question in this proceeding, is that the complainants have shown that their claimed discovery shaft or its equivalent is located upon patented land, to wit: on the land of the "Triangle" and the "Lucky Jim" lodes, two well-known patented claims, and the

patents to which were read in evidence by appellee. They show that the discovery shaft claimed by appellant was on patented ground. These patents are Defendants' Exhibits I and J (Record, pp. 560, 565).

This fact clearly appears from the plat, Exhibit E, attached to Complainants' Exhibit 7, page 514, being a copy of the adverse claim filed on behalf of the "Dave Lewis Hope," in the matter of the application for a patent for the "Ivanpah," and from the patents themselves. (A copy of which plat is attached hereto.)

It is well established that a locator must sink his discovery shaft upon vacant territory.

Lindley on Mines, Section 337.

And it has been held by the Supreme Court of the United States upon an application for a patent upon mining land, where it appeared in the proceedings to determine the adverse claim to the location, that that part of the location upon which the discovery shaft was situated was located upon a patented claim of a third party, that the whole location was defeated.

Gwillim vs. *Donnellan,* 115 U. S., 45.

The rule as laid down by the Supreme Court has been almost uniformly followed by the courts and by the Land Department; and where such appears to be the fact an application for a patent will be denied.

Lindley on Mines, Section 338.

Edw. Williams, 20 L. D., 458 (1895).
Winter Lode, 22 L. D., 302 (1896).

Appellants have evidently awakened to an appreciation of the significance of this fact. We would like to call the attention of the Court to Exhibit E, the plat herein referred to (Record, p. 514) in connection with the incorrect diagram attached to appellants' brief, which shows the said discovery shaft to be well outside the lines of the patented claims referred to, in direct contradiction of the plat or survey offered on the trial. We do this without further comment, but venture at the same time to ask the Court to examine the diagram attached to this brief, which is a copy of the one contained in the record.

If our contention is correct, the location of the appellants was void from the outset; they never did have a valid location even from its attempted inception, and the land alleged to be covered thereby was vacant public domain at the time appellee located.

Conceding all that counsel claim by the decision of the Supreme Court of the United States in the case of *Butte City Water Co.* vs. *Baker,* 196 U. S., 119, 128, relative to our original certificate of location of the "Ivanpah," we submit that all of these defects were remedied by our amended certificate of location, which was filed for record on August 11, 1902, in the office of the Recorder of Nye County, Nevada, and on August

20, 1902, in the office of the Tonopah Mining District Recorder (Record, pp. 538, 9, 40).

Such amended location certificate related back to the original location in the absence of valid intervening rights, and the record in this proceeding shows an entire absence of any such rights.

Lindley on Mines, Section 338.

And such amended certificate may be considered in connection with the said original certificate, even if the latter be deemed void.

Duncan vs. *Fulton,* 61 Pac., 246.
Strepy vs. *Clark,* 5 Pac., 111.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of such certificate, must when contested be established by proof outside of such certificate.

Lindley on Mines, Section 392.
Strepy vs. *Clark,* 5 Pac., 111.

We submit that we have shown a substantial compliance with the statutory provisions of the United States and of the State of Nevada as to the necessary prerequisites thereof prior to the completion of the location by the recordation of the certificate of location, the final step therein. We have shown a discovery on Oc-

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Strepy vs. *Clark,* 5 Pac., 111.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of such certificate, must when contested be established by proof outside of such certificate.

Lindley on Mines, Section 392.
Strepy vs. *Clark,* 5 Pac., 111.

We submit that we have shown a substantial compliance with the statutory provisions of the United States and of the State of Nevada as to the necessary prerequisites thereof prior to the completion of the location by the recordation of the certificate of location, the final step therein. We have shown a discovery on Oc-

tober 10, 1901 (Record, pp. 212, 213, 215); erection of monuments and boundaries marked (Record, pp. 219, 220); necessary preliminary work done within the time required, to wit: about December 1, 1901 (Record, pp. 216, 252); recordation of original certificate of location (Record, p. 228) and of amended certificate of location (Record, pp. 538, 539, 540), showing a complete compliance with the statute of the United States and of the State of Nevada. We have further shown that five hundred dollars' worth of work was done on the claim in June, 1902 (Record, p. 390), and since that time over $70,000 had been expended thereon in development work up to the time of the trial (Record, p. 389).

In conclusion, we urge upon the Court that this is a case where there is a conflict of the evidence, five witnesses against seventeen, and the principal one of the five impeached by at least nine of the others; a case where the appellants have failed absolutely to locate their claim on the ground, and where their notices and certificates of location are absolutely lacking in the statutory requirements, while their amended certificate fixes their discovery shaft or equivalent in one place three hundred feet from the place where it is fixed in another part of the same certificate. In other words, the same shaft is in two places upon the alleged location, three hundred feet apart. From all points of view, the "Ivanpah's" amended certificate complied

with the Nevada Statute in all its technical requirements.

We trust that this Court will concur in the language of Judge Hawley in his opinion rendered in the Court below, and with the following quotation from the opinion, we respectfully submit this brief:

"I am clearly of the opinion that the decided weight " of the evidence shows that on the 10th day of October, " 1901, the ground then located by the "Ivanpah" was " vacant public mineral land, subject to location; that " the "Ivanpah" was a valid location; that the locators " and owners thereof have fully complied with the law, " and have the better right to the ground covered by " such location. . . . The defendant proved all the " necessary facts entitling it to a patent" (Record, pp. 52, 53).

Respectfully submitted,

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T.3N.R.42E.
Sec. 35.
N.E. COR. SEC. 35.
N. 11°14' E 121.8
COR. N° 1
N 86°39' E
600
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COR. N° 6
Mining Chance Unsurveyed
Conflict
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post marked N. end Center
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